No. 14-981

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In The

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* PROFESSORS CEDRIC MERLIN POWELL, SAMUEL A. MARCOSSON, GOLDBURN P. MAYNARD, JR., LAURA RENE MCNEAL, AND ENID F. TRUCIOS-HAYNES OF THE UNIVERSITY OF LOUISVILLE BRANDEIS SCHOOL OF LAW, AND LOUISVILLE METRO HUMAN RELATIONS COMMISSION-ADVOCACY BOARD IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Brown v. Board of Education, 347 U.S. 483 (1954), has been cited extensively by this Court and advocates in cases involving the constitutionality of affirmative action programs used at post-secondary institutions. This appeal is no exception. When this case was last here, *Brown* again received considerable attention by members of this Court. *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2423 (2013) (Thomas, J., concurring). And Petitioner Abigail Fisher now relies on *Brown* in her brief. Pet. Br. at 25.

This Court's reliance on *Brown* has gone beyond the text of the opinion. In recent decisions, members of this Court have ascribed certain views of the Equal Protection Clause to the NAACP lawyers who litigated *Brown* to support a position that the Constitution is "colorblind," and categorically bans the use of race in the context of university and college admissions. *Fisher*, 133 S. Ct. at 2428-29 (Thomas, J., concurring); *see also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007); *id.* at 772 (Thomas, J., concurring).

Since the perspectives of the *Brown* lawyers are now relevant to this Court's equal protection jurisprudence, *amici* will address the following question:

> Whether the *Brown* lawyers embraced a "colorblind Constitution" in which the use of race is completely prohibited, including the use of affirmative action in admissions at post-secondary institutions for purposes of increasing and maintaining integration and diversity.

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INTEREST OF *AMICI CURIAE*

In accordance with Supreme Court Rule 37, *amici curiae* respectfully submit this brief in support of Respondents.[1] *Amici curiae* are a group of law professors and educators at the University of Louisville Brandeis School of Law. They have researched and written articles on this Court's constitutional jurisprudence, including this Court's equal protection decisions. As educators at a public university, they have also seen and experienced the benefits of diversity within their classrooms. *Amicus curiae* Louisville Metro Human Relations Commission-Advocacy Board is a municipal administrative agency in Louisville, Kentucky responsible for promoting and securing mutual understanding and respect among different religious, social, economic, ethnic, and racial groups. Louisville is the home of the University of Louisville, and Louisville's voluntary school integration plan was the subject of the plurality decision in *Parents Involved*.

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[1] All parties have consented to the filing of this brief under Rule 37.3(a). Letters showing such consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* states that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF THE ARGUMENT

Brown is one of this Court's most important equal protection decisions. In an acknowledgement of *Brown*'s significance and the work of the *Brown* lawyers in dismantling legalized segregation, members of the Court have invoked the arguments of those lawyers in recent equal protection opinions. Of particular significance in this case is Petitioner Abigail Fisher's reliance on *Brown* and opinions by members of this Court that invoke *Brown* and the *Brown* lawyers to urge that the Court limit, if not completely ban, the consideration of race in college and university admissions under the notion that the Constitution is colorblind.

Using *Brown* and the *Brown* lawyers to argue for a colorblind approach is problematic for several reasons. First, *Brown* and the arguments of the *Brown* lawyers were built upon the belief that the Equal Protection Clause did not prohibit all consideration of race. The very Congress that drafted and passed the Fourteenth Amendment adopted race-conscious measures to assist newly freed slaves. Congress' use of race-conscious measures during the immediate aftermath of the Civil War and Reconstruction casts substantial doubt that the Fourteenth Amendment requires colorblindness.

Second, *Brown* and the arguments of the *Brown* lawyers were clearly concerned about the development and maintenance of a caste system defined by the use of invidious racial classifications, an idea first

articulated in Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896). While Justice Harlan's reference to a colorblind Constitution is frequently cited, his recognition that "[t]here is no caste here" receives scant attention in this Court's decisions. 163 U.S. at 559 (Harlan, J., dissenting). Justice Harlan's *Plessy* dissent and its numerous references to caste and the stigmatization of African-Americans as "inferior" adds context to his single use of the term "color-blind." *Id.* When considered as a whole, Justice Harlan's *Plessy* dissent is concerned about the emergence of a social hierarchy in which invidious racial classifications would be used to forever brand African-Americans as second-class citizens.

Third, *Brown* and the arguments by the *Brown* lawyers provide very little support for colorblindness as an independent constitutional principle. Neither *Brown* nor the *Brown* lawyers exclusively relied upon the notion that the Constitution is "colorblind." Colorblindness did not emerge as a constitutional theory until after *Brown* and only developed its current tenor during political debates over affirmative action during the 1970s and 1980s. The *Brown* lawyers expressly acknowledged the possibility that the government's use of racial classifications could be reasonable in some circumstances in their briefs and oral arguments in several desegregation cases before this Court, including *Brown*. The *Brown* lawyers believed that segregation was an unreasonable use of racial classifications because it had no other purpose but to treat African-Americans as inferior.

Fourth, the post-*Brown* judicial opinions and writings of the *Brown* lawyers leave no doubt that they thought the use of race in college and university admissions was constitutionally permissible. The *Brown* lawyers distinguished segregation's invidious use of racial classifications from affirmative action policies. The *Brown* lawyers believed that the use of affirmative action to afford educational and economic opportunities to African-Americans and other minorities was fundamental to breaking down racial stereotypes and remedying the lingering effects of slavery and state-sponsored segregation. The *Brown* lawyers did not see *Brown* as a constitutional impediment to affirmative action programs; to the contrary, they believed *Brown* to be the very impetus of such programs.

ARGUMENT

I. The notion that the Constitution is colorblind has no basis in the original intent of the Fourteenth Amendment or *Brown*.

A. Colorblindness has no basis in the original intent of the Fourteenth Amendment.

The debate about the proper understanding of *Brown* and the intent of the NAACP lawyers that argued the case is part of a larger debate about the proper interpretation of the Equal Protection Clause. This debate originates with Justice Harlan's *Plessy*

dissent. Justice Harlan's pronouncement that the "[C]onstitution is color-blind and neither knows nor tolerates classes among citizens[,]" is often cited as support for the contention that the Equal Protection Clause bans all uses of race both invidious and benign. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting); *see also Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1648 (2014) (Scalia, J., concurring); *Parents Involved*, 551 U.S. at 772 (Thomas, J., concurring).

But this view of colorblindness has no historical pedigree. It cannot be based in the original intent of the Fourteenth Amendment because the framers of the Amendment explicitly adopted race-conscious legislation to assist former slaves in their transition to full citizenship. *See* Eric Schnapper, *Affirmative Action and The Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 789 (1985). That legislation expressly allotted federal benefits based upon race. One statute provided money for "the relief of destitute *colored* women and children." Act of July 28, 1866, ch. 296, 14 Stat. 310, 317 (emphasis added). Another statute appropriated money and created administrative procedures for awarding bounties and prize money to "colored" members of the Union Army. Act of Mar. 3, 1873, ch. 227, 17 Stat. 510, 528; Act of Mar. 3, 1869, ch. 122, 15 Stat. 301, 302. The Civil Rights Act of 1866, by prohibiting discrimination based upon "any previous condition of slavery or involuntary servitude" and securing the right to

engage in certain activity to the same extent as "white citizens," also had an overt racial focus. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

Even under facially neutral, "colorblind" measures enacted by Congress, such as the 1865 Freedmen's Bureau Act, newly freed slaves received the bulk of assistance as opposed to white refugees of the Civil War. *See* Schnapper, *supra*, at 761-63. And under the 1866 Freedmen's Bureau Act, which retained some facially neutral, "colorblind" measures of the 1865 Act, Congress included language that limited educational assistance from the Bureau to newly freed slaves. *See id.*; *see also* Act of July 16, 1866, ch. 200, 14 Stat. 173, 176. This sparked a tremendous amount of debate in Congress, with some arguing that the passage of such race-conscious legislation would exacerbate racial tensions and encourage greater dependence by newly freed slaves on federal programs. *See* Schnapper, *supra*, at 764-65.

But supporters of the 1866 Freedmen's Bureau Act rejected the argument that the Bureau should provide educational assistance on a "colorblind" basis. They emphasized the need to educate newly freed slaves to make them self-sufficient, which, in turn, would benefit the nation as a whole. *See id.* at 768. When President Andrew Johnson vetoed the 1866 Freedmen's Bureau House Bill, H.R. 613, raising the same concerns as some members of Congress regarding the exclusion of white refugees from the Bureau's educational initiatives, Republicans overrode that

veto with substantial majorities in both chambers of Congress. *See id.* at 774-75.

Congress continued to reauthorize the Freedmen's Bureau between 1868 and 1870. During that time, the Bureau devoted more than two-thirds of its funds to educate newly freed slaves and to construct several colleges and universities for their benefit. *See id.* at 781-82. And during the debates over the Fourteenth Amendment in 1868, "[n]o member of Congress hinted at any inconsistency between the [F]ourteenth [A]mendment and the Freedmen's Bureau Act." *Id.* at 785.[2] This was because Congress intended for the Fourteenth Amendment to remove any doubt about the constitutionality of the Freedmen's Bureau and other race-conscious legislation. *See id.* at 786-87. Thus, at the time of the Fourteenth Amendment's enactment, Congress "regarded the

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[2] Congress' use of race-conscious measures during Reconstruction is irreconcilable with a colorblind Constitution. *See Parents Involved*, 551 U.S. at 772 n.19 (Thomas, J., concurring). At the time, Congress was not simply trying to integrate newly freed slaves into American society, but also fighting against the emergence of Black Codes and "Jim Crow" laws in the South. "State-enforced slavery" did not comprise a discrete, isolated injury inflicted upon African-Americans that the Reconstruction Amendments and Congress' race-conscious measures could easily remedy. "State-enforced slavery" morphed into a system of legalized segregation that undermined many of Congress' race-conscious measures and continued to treat African-Americans as inferior well after Reconstruction. *Plessy* ensured that legalized segregation and the inferior legal status of African-Americans would continue well into the 1960s.

race-conscious assistance programs of the Freedmen's Bureau as furthering rather than violating the principle of equal protection." *Id.* at 787. This shows that the Congress that adopted the Fourteenth Amendment never intended to adopt colorblindness as a constitutional principle.[3]

B. Colorblindness has no basis in Justice Harlan's *Plessy* dissent.

Because colorblindness lacks a historical foundation in the original intent of the Fourteenth Amendment, Justice Harlan's statement that the "[C]onstitution is color-blind" in *Plessy* is often the starting point for

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[3] This Court's decisions that interpreted the Fourteenth Amendment immediately after its enactment make clear that the Reconstruction Amendments were never intended to incorporate a principle of colorblindness. *See Slaughter-House Cases*, 83 U.S. 36, 71 (1872) ("[N]o one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."); *see also Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1880) ("The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race, – the right to exemption from unfriendly legislation against them distinctively as colored, – exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.").

the analysis in many of this Court's equal protection opinions. But quoting that the "[C]onstitution is color-blind" only captures part of what Justice Harlan said about the Equal Protection Clause. Immediately before stating that the "[C]onstitution is color-blind," Justice Harlan explained that the primary objective of the Equal Protection Clause is to prevent the creation of a racial caste:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in the view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here.

Plessy, 163 U.S. at 559 (Harlan, J., dissenting).

This portion of Justice Harlan's conception of the Equal Protection Clause has rarely been factored into this Court's references to colorblindness. When placed in context, Justice Harlan's *Plessy* dissent contained a comprehensive theory of equal protection that combined an anti-caste rationale with colorblindness. Justice Harlan did not accept a pure anti-caste rationale that focused only on preventing racial subjugation of certain groups. Nor was his analysis solely limited to a notion of colorblindness in which the use of racial classifications is completely prohibited.

Instead, the real constitutional problem identified by Justice Harlan in *Plessy* was the invidious use of racial classifications to degrade and relegate disfavored groups to a perpetual racial underclass.

Justice Harlan explained that one of the chief evils of Louisiana's law segregating railway carriages by race was that it placed "a condition of legal inferiority" on African-Americans. *Plessy*, 163 U.S. at 563 (Harlan, J., dissenting); *see also id.* at 560. He recognized that by thrusting inferior status upon African-Americans, southern states would be free to enact legislation "to defeat the beneficent purposes" of the Reconstruction Amendments and give whites privileged status while degrading African-Americans. *Id.* at 560. While Justice Harlan's reference to color-blindness is undoubtedly an important part of his analysis, it comes in a paragraph that describes a larger concern with a social hierarchy defined by the invidious use of racial classifications. *See* Scott Grinsell, *The Prejudice of Caste: The Misreading of Justice Harlan and the Ascendency of Anticlassification*, 15 MICH. J. RACE & L. 317, 357 (2010).[4] Justice Harlan's

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[4] Justice Harlan's concern about a potential caste system did not arise in a vacuum, but was the product of abolitionist arguments against slavery before the Civil War and fear about laws mandating segregation in public accommodations that arose during Reconstruction. *See* Grinsell, *supra*, at 339-44; *see also id.* at 347-53. The attorneys for Homer Plessy also invoked caste as a metaphor to explain the effect Louisiana's law requiring the segregation of railroad cars had on African-Americans. *See id.* at 353-55.

use of colorblindness was a small part of an analysis that was otherwise dominated by depictions of the status-based harms legalized segregation forced upon African-Americans.

In the years immediately following *Plessy*, commentators focused on Justice Harlan's explanation of the intent and effect of legalized segregation on African-Americans as a group. *See id.* at 357 n.157 (citing H.B. Brown, *The Dissenting Opinions of Mr. Justice Harlan*, 46 AM. L. REV. 321 (1912)); *see also id.* at 357 n.159. As a result, Justice Harlan's *Plessy* dissent was overwhelmingly viewed as an argument against the development of a racial caste system. That remained the dominant view of his dissent until *Brown*. *Id.* at 358-61.

C. Colorblindness has no basis in *Brown* and only emerged as a constitutional theory after the decision.

The emergence of "Jim Crow" laws and Black Codes after *Plessy* validated the constitutional and practical concerns raised in Justice Harlan's dissent. Indeed, it was not until *Brown* that this Court fully repudiated the "separate but equal" doctrine of *Plessy* and began the first steps since Reconstruction to restore African-Americans to full citizenship. *Brown*, 347 U.S. at 490-91. *Brown* did not speak exclusively in terms of eliminating caste or requiring colorblindness. The terms do not even appear in the opinion. Nor did the opinion speak in generalities.

Brown did not merely find that "government classification and separation on grounds of race themselves denoted inferiority," but explicitly pointed to the classification and separation of African-American schoolchildren as the cause. *Parents Involved*, 551 U.S. at 746; *see also Brown*, 347 U.S. at 494. The separation of African-American schoolchildren from white children treated the African-American schoolchildren as "inferior," thereby constituting a denial of equal protection.

Brown did not address just any practice of using race, but went to the heart of a "separate but equal" regime that was intended to segregate and degrade African-Americans. The Court's conclusion was entirely consistent with Justice Harlan's *Plessy* dissent. *Brown* prohibited the government's intentional use of invidious racial classifications to separate and label African-Americans inferior. In reaching that conclusion, *Brown* did not choose between the anti-caste rationale or colorblindness because Justice Harlan did not do so in *Plessy*. And the NAACP lawyers in *Brown* had not limited their arguments to either theory. *See* Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 207 (2008).

The false dichotomy between the anti-caste rationale and colorblindness developed in the immediate aftermath of *Brown* as a way to justify the Court's decision. *See* Reva B. Siegel, *Equality Talks: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L.

REV. 1470, 1475 (2004). In 1959, Harvard Law School Professor Herbert Wechsler first questioned a pure anti-caste justification for *Brown* in his highly influential article, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). In that article, Professor Weschler argued that *Brown* was motivated solely by a concern for the group harm caused by segregation: "that racial segregation is, in principle, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved." *Id.* at 1490-91 (quoting Weschler, *supra*, at 33).

In response to Professor Wechsler's criticism, supporters of *Brown* adopted colorblindness "as a more neutral way of defending *Brown*." john a. powell & Stephen Menendian, *Parents Involved: The Mantle of Brown, The Shadow of Plessy*, 46 U. LOUISVILLE L. REV. 631, 660-62 (2008). Whereas Professor Wechsler gave voice to those southerners that contested the correctness of *Brown*, colorblindness "provided a new way of speaking about *Brown* that frankly insulated *Brown* from the southern debate over harms, and which harms were to be preferred." *Id.* at 661; *see also* Siegel, *supra*, at 1490 n.65 ("Wechsler seemed to adopt as his own the kinds of questions the resisting Southern judges aimed at Brown[.]"). "Colorblindness," then, became a powerful justification for the result reached in *Brown*.

Colorblindness also served as a useful rhetorical tool to strike down "Jim Crow" laws. Justice Harlan's

dissent and the idea of colorblindness were first invoked by Justice Douglas' concurring opinion in *Garner v. Louisiana*, a case involving segregated lunch counters. 368 U.S. 157, 185 (1961) (Douglas, J., concurring). Early proponents of colorblindness invoked Justice Harlan's *Plessy* dissent to address segregated laws and policies that had the degradation of African-Americans as their main objective. *Id.*; *see also United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 876-77 (5th Cir. 1966) ("The Constitution is both color blind and color conscious.").

This early use of colorblindness was much closer to Justice Harlan's original formulation, in which the Equal Protection Clause prohibited the government's use of invidious racial classifications that had the effect of demeaning and labeling African-Americans with inferior status. *See Jefferson County Bd. of Educ.*, 372 F.2d at 876-77; *see also Dowell v. Sch. Bd. of Oklahoma City Public Sch.*, 244 F. Supp. 971, 981 (W.D. Okla. 1965), *aff'd in part*, 375 F.2d 158 (10th Cir. 1967), *cert. denied*, 387 U.S. 931 (1967).

But as federal district courts began implementing *Brown* throughout the country, including areas in the north, colorblindness evolved into a justification to limit the authority of federal courts to enter desegregation decrees consistent with the case. *See* powell & Menendian, *supra*, at 662; *see also* Siegel, *supra*, at 1512 ("[T]he claim that *Brown* was centrally concerned with the wrong of 'separation by racial classification' functioned as a limit on federal courts, leaving Northern school districts with control over

the pace and form of desegregation."). And as the debate over the use of affirmative action intensified during the 1970s and 1980s, the rhetoric of colorblindness emerged as a potent political device to equate remedial uses of race with invidious racial discrimination. Grinsell, *supra*, at 327-28.

This later version of colorblindness took Justice Harlan's original concept of equal protection and turned it into an argument for an outright ban on the use of race in all forms. Colorblindness was no longer principally about *Brown* and the power of federal courts, but a political argument about racial quotas and preferential treatment. *See* Attorney General Edwin Meese, Dickinson College Constitution Day Speech (Sept. 17, 1985), *available at* http://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/09-17-1985.pdf. As this new idea of colorblindness increasingly became a fixture in the political debates over affirmative action, it was frequently invoked by members of the Court, often with Justice Harlan's *Plessy* dissent cited in support. *See, e.g.*, *Fullilove v. Klutznick*, 448 U.S. 448, 522-23 (1980) (Stewart, J., dissenting); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring); *but see Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 336 (1978) (Brennan, J., concurring in part and dissenting in part) ("[N]o decision of this Court has ever adopted the proposition that the Constitution must be colorblind.").

In short, colorblindness, at least as it is now articulated, does not have longstanding historical

roots in the original intent of the Fourteenth Amendment or Justice Harlan's *Plessy* dissent. Justice Harlan's use of colorblindness must be considered in light of the anti-caste language in his dissent. He was concerned with the effect of invidious racial classifications to demean African-Americans. By emphasizing the status-based harm inflicted upon African-American schoolchildren by segregation, this Court's rationale in *Brown* essentially adopted the reasoning of Justice Harlan's *Plessy* dissent: that the government's use of invidious racial classifications violated the Equal Protection Clause because it had the effect of demeaning African-American schoolchildren and labeling them as inferior. A colorblindness theory that categorically bans the use of race is entirely grounded in contemporary political analyses of *Brown* and Justice Harlan's *Plessy* dissent than in the actual text of those opinions themselves.

II. The *Brown* lawyers did not argue for or endorse the notion that the Constitution is colorblind.

In recent decisions involving affirmative action and school desegregation, members of this Court have cited to the briefs and oral arguments of the *Brown* lawyers in support of a colorblind reading of the Equal Protection Clause. *E.g.*, *Parents Involved*, 551 U.S. at 747; *see also Fisher*, 133 S. Ct. at 2423 (Thomas, J., concurring). In fact, the plurality opinion in *Parents Involved* went to great lengths to attribute the current version of colorblindness to the *Brown*

lawyers, even going so far as to cite portions of the oral argument of then-NAACP lawyer and later federal district judge Robert L. Carter. *Parents Involved*, 551 U.S. at 747.[5] But this selective use of Judge Carter's oral argument drew a strong rebuke from the *Brown* lawyers, including from Judge Carter himself. Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES, June 29, 2007, http://www.nytimes.com/2007/06/29/us/29assess.html. Two *Brown* lawyers, Jack Greenberg and William T. Coleman, Jr., described the attribution of the new colorblindness idea to them as "preposterous," "dirty pool," and called the plurality opinion "100 percent wrong." *Id.* Greenberg further explained that it was "the marginalization and subjugation of black people" that was

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[5] There was nothing new about this approach. In fact, attributing colorblindness to the *Brown* lawyers had been politically en vogue for years. For example, in a 1984 editorial arguing against racial "quotas," William Bradford Reynolds, the Assistant Attorney General for the Civil Rights Division in the Department of Justice, wrote that "[i]t was the N.A.A.C.P. brief in *Brown* that argued, correctly, that '[t]he 14th Amendment compels the states to be colorblind in exercising their power and authority.'" William Bradford Reynolds, *Racial Quotas Hurt Blacks and the Constitution*, N.Y. TIMES, Dec. 9, 1985, http://www.nytimes.com/1985/12/09/opinion/l-racial-quotas-hurt-blacks-and-the-constitution-213019.html. Reynolds then invoked Justice Harlan's *Plessy* dissent as providing an authoritative colorblind explanation of the Constitution: "In any consideration of the Constitution, Justice Harlan's dissent in *Plessy* invariably emerges as the definitive statement of the proper construction of the 14th Amendment." *Id.* As demonstrated below, this view of the *Brown* lawyers, whether articulated in the political arena or elsewhere, is incorrect.

the chief concern of the *Brown* plaintiffs, not categorical colorblindness. *Id.*

Judge Carter echoed Greenberg's comments. As Judge Carter noted, when *Brown* was decided "[a]ll that race was used for at that point in time was to deny equal opportunity to black people," and that "[i]t's to stand that argument on its head to use race the way they use it now." *Id.* These comments recognized that the colorblind view of the Equal Protection Clause that governed the plurality's opinion in *Parents Involved* was much different from the Equal Protection Clause the *Brown* lawyers advocated for. The *Brown* lawyers believed that the Equal Protection Clause banned the invidious use of racial classifications intended to demean certain groups as inferior.

A. Briefs in *Brown* and other desegregation cases show that the *Brown* lawyers did not believe that all racial classifications were unconstitutional.

Brown itself represents the culmination of several cases by the *Brown* lawyers challenging the use of segregation at public universities. These cases are critical to understanding *Brown*, the views of the *Brown* lawyers on equal protection, and the role of *Brown* in the debate over affirmative action.

In one of the first cases attacking the use of segregation in higher education, *Sipuel v. Board of Regents of University of Oklahoma*, 332 U.S. 631

(1948), the *Brown* lawyers argued in the language of both anti-caste and colorblindness. For example, they wrote that "[c]lassifications and distinctions based on race or color have no moral or legal validity in our society." Br. for Pet'r, *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1947) (No. 369), 1947 WL 44231, at *27. But even that explanation of color-blindness was qualified. Because the case had been decided on the pleadings below, the *Brown* lawyers noted that there was "no evidence . . . on . . . the reasonableness of the racial distinctions" employed by Oklahoma. *Id.* at *32. The acknowledgement that some racial classifications could be reasonable if convincing evidence could be shown demonstrates that the *Brown* lawyers did not believe that the use of all racial classifications were per se unconstitutional.

Later in the brief, the *Brown* lawyers shifted their focus and explicitly argued that the use of segregation helped perpetuate a racial caste system:

> Segregation in public education helps to preserve and enforce a caste system which is based upon race and color. It is designed and intended to perpetuate the slave tradition sought to be destroyed by the Civil War and to prevent Negroes from attaining the equality guaranteed by the federal Constitution. Racial separation is the aim and motive of paramount importance – an end in itself. Equality, even if the term be limited to a comparison of physical facilities, is and can never be achieved.
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> * * *

> Racial segregation in education originated as a device to "keep the Negro in his place", *i.e.*, in a constantly inferior position.

Id. at *36-37 (punctuation in original).

The *Brown* lawyers also expressed concern that the continued use of segregation in higher education would have detrimental effects on "the long-range development of the Negro people" by denying them a professional class to serve their communities. *Id.* at *44. By denying individual African-Americans the right to attend integrated professional and graduate schools, segregation had an impact on African-Americans as a group and the rest of Oklahoma's citizens "by denying to them the full resources of more than 168,849 Negro citizens." *Id.*[6]

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[6] The benefits the *Brown* lawyers believed would arise from the end of segregation in higher education paralleled those this Court found persuasive in *Grutter v. Bollinger*, 539 U.S. 306 (2003). This Court in *Grutter* found that the University of Michigan Law School's admissions policy led to "cross-racial understanding," which "help[ed] to break down racial stereotypes, and enable[d] students to better understand persons of different races." 539 U.S. at 330 (internal punctuation omitted). Similarly, the *Brown* lawyers believed that segregation in higher education "prevent[ed] both the Negro and white student from obtaining a full knowledge of the group from which he is separated . . . ." Br. for Pet'r, *Sipuel*, at *45; *see also* Br. for Pet'r, *Sweatt*, at *26-29; Br. for Appellant, *McLaurin*, at *24-26. Further, segregated universities created "a feeling of distrust for the minority group . . . in the community at large," and "accentuate[d] imagined differences between Negroes and whites." Br. for Pet'r, *Sipuel*, at *45. Thus, "[t]he very act of segregation tend[ed] to crystallize and perpetuate group isolation, and

(Continued on following page)

The *Brown* lawyers reiterated these concepts in *Sweatt v. Painter*, 339 U.S. 629 (1950), and *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950). When it came to colorblindness, the *Brown* lawyers again recognized that some racial classifications were permissible as long as they were "rationally related to the legislative end." Br. for Pet'r, *Sweatt v. Painter*, 339 U.S. 629 (1950) (No. 44), 1950 WL 78681, at *11; *see also* Br. for Appellant, *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950) (No. 34), 1950 WL 78675, at *17. The *Brown* lawyers argued that the racial classifications in *Sweatt* and *McLaurin* failed because there was "no rational connection between racial differences" and the government's justifications for mandating segregated public education. *See* Br. for Pet'r, *Sweatt*, at *13; *see also* Br. for Pet'r, *McLaurin*, at *22. That is not an endorsement of colorblindness.

The *Brown* lawyers then turned to an anti-caste rationale. For example, in *Sweatt*, the government's argument that Heman Sweatt could receive a quality legal education in a segregated school failed because it "arbitrarily placed upon him the onus of being 'different,'" and that "difference . . . carrie[d] with it

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serv[ed], therefore, as a breeding ground for unhealthy attitudes." Br. for Pet'r, *Sweatt*, at *26. This shows that the *Brown* lawyers believed that educational benefits from a diverse campus environment helped all students, and better prepared them to work within a pluralistic society. *See* Br. for Pet'r, *Sipuel*, at *44-45; *see also Grutter*, 539 U.S. at 330.

the tacit taint of inferiority." Br. for Pet'r, *Sweatt*, at *29-30.[7] And in *McLaurin*, the *Brown* lawyers explained that one of the reasons segregated graduate schools at the University of Oklahoma were unconstitutional was because segregation "[gave] notice to McLaurin, his fellow students and the world at large, that the State of Oklahoma has decreed that McLaurin belong[ed] to an 'inferior order' and [was] 'altogether unfit to associate with the white race' in their mutual efforts to secure an education." Br. for Pet'r, *McLaurin*, at *34 (punctuation in original). Thus, these briefs demonstrate that the *Brown* lawyers did not object to all racial classifications, but

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[7] The *Brown* lawyers also made a distinction between historically black colleges and universities established as a result of segregation and those historically black colleges and universities founded by African-Americans themselves and others as a way to aid African-Americans before and after the Civil War. Judge Constance Baker Motley explained that unlike historically black colleges and universities that were the product of segregation, private black colleges "are the repositories of black culture, if there is such a thing," while "[s]tate-segregated black colleges bear the same stigma as the Jim Crow railroad car or the back of the bus[.]" Constance Baker Motley, EQUAL JUSTICE UNDER LAW: AN AUTOBIOGRAPHY 239 (1999). And in *Sweatt*, the *Brown* lawyers conducted a comparative analysis between Texas' thirteen state-supported schools for white students and Prairie View A&M, the only African-American school in the state at the time, to argue that the facilities were unequal. *See* Br. for Pet'r, *Sweatt*, at *67-75. The *Brown* lawyers argued that the substantial difference between Prairie View A&M and the state-supported white schools in accreditation, curriculum, faculty, facilities, and expenditures all contributed to maintaining second-class status for African-Americans. *See id.*

only those invidious racial classifications that were intended to send the message that African-Americans were inferior to whites. *See id.* at *27.

It is this understanding of the Equal Protection Clause that found its way into the briefs in *Brown*. Indeed, in the Kansas case, the *Brown* lawyers recognized that Kansas had "undoubted power to confer benefits or impose disabilities upon selected groups of citizens in the normal execution of governmental functions . . . ." Br. for Appellants, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 1), 1952 WL 82046, at *6. But, as the *Brown* lawyers argued, the state's exercise of that power was required to "be reasonable." *Id.* And as they argued in *Sweatt* and *McLaurin*, the state's use of racial classifications were not categorically banned, but were required to be "based upon real differences pertinent to a lawful legislative objective." *Id.*

Segregated schools in Kansas failed that test not because they were the product of mere racial classifications, but because Kansas' use of racial classifications "place[d] the Negro at a disadvantage in relation to other racial groups in his pursuit of educational opportunities . . . ." *Id.* at *10. To the *Brown* lawyers, the danger of Kansas' invidious use of racial classifications came from the fact that it denied "the Negro status, power, and privilege . . . and instill[ed] in him a feeling of inferiority." *Id.* at *9. Indeed, the *Brown* lawyers believed that the "primary purpose of the Fourteenth Amendment was to deprive [Kansas] of *all* power to perpetuate such a caste system." Br.

for Appellants, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument), 1953 WL 48699, at *17 (emphasis in original). It was this interpretation of the Fourteenth Amendment that prevailed in *Brown*, not a categorical colorblindness principle. *See* 347 U.S. at 494; *see also id.* at 494 n.11.[8]

B. The *Brown* lawyers did not argue for a colorblind interpretation of the Equal Protection Clause at oral argument before this Court.

During oral argument in *Brown*, the *Brown* lawyers never once deviated from contending that the invidious use of racial classifications that demeaned and labeled African-American schoolchildren as inferior was unconstitutional in favor of outright categorical colorblindness. Instead, the *Brown* lawyers'

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[8] These arguments also prevailed in *Bolling v. Sharpe*, 347 U.S. 497 (1954). Notably, in *Bolling*, this Court did not find that all classifications of race were unconstitutional. 347 U.S. at 499. This was because the lawyers in *Bolling* themselves did not argue for such a reading of the Equal Protection Clause. The lawyers in *Bolling* did not argue for an outright ban on all racial classifications, and specifically argued that segregation in public schools was unconstitutional because it was "aimed at Negroes," and "indoctrinate[d] both white and colored races with the caste conception . . . ." Br. for Pet'rs, *Bolling v. Sharpe*, 347 U.S. 497 (1954) (No. 4), 1952 WL 47257, at *36, *39; *see also id.* at *21 ("[T]he exclusion of minor petitioners . . . solely because of race or color has no reasonable relation to any educational purpose suggested by respondents[.]").

arguments tracked the written arguments they made in their briefs in *Sipuel*, *Sweatt*, and *McLaurin*.

Carter did state that "one fundamental contention" of the *Brown* lawyers was "that no [s]tate has any authority under the equal-protection [sic] clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens," but that statement was based upon the effect segregation had on African-American schoolchildren. *Parents Involved*, 551 U.S. at 747 (citing Tr. of Oral Arg. in *Brown I*, O.T. 1952, No. 8, p. 7 (Robert L. Carter, Dec. 9, 1952)). Just a moment later, Carter explained that "where public school attendance is determined on the basis of race and color, that it is impossible for Negro children to secure equal educational opportunities within the meaning of the equal protection of the laws." Tr. of Oral Arg. in *Brown I*, O.T. 1952, No. 8 (Robert L. Carter, Dec. 9, 1952), *reprinted in* ARGUMENT: THE COMPLETE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952-55 14 (Leon Friedman ed., Chelsea House Publishers 1969) (hereinafter "Friedman").

Carter's anti-classification argument was always connected with the harm segregation had on African-Americans and the potential benefits of integration. While Carter argued that Kansas' statute requiring segregated schools was "fatally defective" under the "normal rules of classification," a "second part" of that contention was that "segregation [made] it impossible for Negro children . . . to receive equal educational

opportunities." Friedman, *supra*, at 15. To illustrate that point, Carter referenced "finding No. 8" of the district court below, which this Court later cited in the *Brown* opinion as evidence of the "detrimental effect" segregation had upon African-American schoolchildren. *Compare id.* at 15 *with Brown*, 347 U.S. at 494.

The *Brown* lawyers freely moved between the anti-caste rationale and colorblindness without making a formal distinction between the two. Thurgood Marshall argued that "this Court has repeatedly said that you cannot use race as a basis of classification," but followed that statement by mentioning the amount of evidence placed in the record regarding psychological harm inflicted upon African-American schoolchildren by segregation. Tr. of Oral Arg. in *Briggs v. Elliott*, O.T. 1952, No. 101 (Thurgood Marshall, Dec. 9, 1952), *reprinted in* Friedman, *supra*, at 65-66. Later, during his rebuttal in the 1953 oral argument of *Briggs*, Marshall contended that South Carolina's use of racial classifications to segregate could only be based on the perceived inferiority of African-Americans. Tr. of Oral Arg. in *Briggs v. Elliott*, O.T. 1953, No. 4 (Thurgood Marshall, rebuttal, Dec. 8, 1953), *reprinted in* Friedman, *supra*, at 239 ("[T]he only way this Court can decide this case in opposition to our position, is that there must be some reason which gives the state the right to make a classification that they can make in regard to nothing else in regard to Negroes, and we submit the only way to arrive at this decision is to find that for some

reason Negroes are inferior to all other human beings.").[9]

These arguments show that the *Brown* lawyers did not think that racial classifications were invalid in the abstract, but required some consideration of the deleterious effects segregation had on the African-American schoolchildren required to attend separate schools. Similar to the dissent in *Plessy*, the *Brown* lawyers' focus on the status-based harm to African-American schoolchildren came from their belief that the Fourteenth Amendment was intended to eliminate a caste system defined by the government's invidious use of racial classifications.

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[9] Spottswood Robinson, in the companion case of *Davis v. County School Board of Prince Edward County, Virginia*, emphasized the connection between the harm segregation caused African-American schoolchildren and the purpose of the Reconstruction Amendments. He argued that Virginia could not assert a legitimate justification for segregating African-American schoolchildren under this Court's then-existing equal protection jurisprudence because "the original notion behind school segregation laws was to impose upon Negroes disabilities which prior to the time of the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments they labored under." Tr. of Oral Arg. in *Davis v. School Bd. of Prince Edward County, Va.*, O.T. 1952, No. 191 (Spottswood Robinson, Dec. 10, 1952), *reprinted in id.* at 76. One consequence of Virginia's use of segregation was that it made more difficult for African-American schoolchildren to attend college, and as a result, "handicap[ped] Negro students in their educational endeavors and [made] it impossible for Negro students to obtain educational opportunities and advantages equal to those afforded white students." *Id.* at 77.

C. The writings and opinions of the *Brown* lawyers make clear that they did not believe that affirmative action involved unconstitutional racial classifications.

The opinion in *Brown* and the arguments made in that case do not provide a complete picture of what the *Brown* lawyers thought about the government's use of racial classifications. The *Brown* lawyers undoubtedly believed that racial classifications could not be used to segregate African-Americans and whites with the intent of demeaning African-Americans as inferior. But when *Brown* was argued, the *Brown* lawyers had little to no understanding of affirmative action. Jack Greenberg, *Roberts, Breyer, Louisville, Seattle and Humpty Dumpty*, HUFFINGTON POST, Mar. 31, 2014, http://www.huffingtonpost.com/jack-greenberg/roberts-breyer-louisville_b_60000.html. Affirmative action policies designed to achieve integration and diversity on college campuses developed decades later. And when confronted with the issue, the *Brown* lawyers believed that affirmative action was entirely consistent with their understanding of the Equal Protection Clause.

Justice Marshall believed that affirmative action programs were constitutional. *Bakke*, 438 U.S. at 387 (opinion of Marshall, J.); *see also id.* at 402. In *Bakke*, Justice Marshall first recounted the history of Congress' use of race-conscious legislation during Reconstruction and suggested that it served as a precursor to modern-day affirmative action programs. *Id.* at

390-91. He then cited *Brown* and suggested that it, along with federal legislation and "numerous affirmative action programs," was essential to moving African-Americans to "complete equality." *Id.* at 402. And after *Bakke*, he continued to conclude that affirmative action programs were constitutional when intended to remedy past discrimination and prevent the government from making decisions that "reinforc[e] and perpetuat[e] the exclusionary effects of past discrimination." *Croson*, 488 U.S. at 535 (Marshall, J., dissenting) (collecting authority); *id.* at 537.

Judge Constance Baker Motley, who joined the NAACP Legal Defense and Educational Fund in 1945 and drafted the complaint in *Brown*, believed that "affirmative action [was] necessary to ensure that resegregation [did] not occur," "assur[ed] quality education in all schools so that blacks [could] catch up educationally," and "prevent[ed] white flight." Motley, *supra*, at 241; *see also id.* at 58-59. *Brown* was "not only a statement of what the equal protection clause require[d] but, more broadly speaking, a statement of what justice require[d]." *Id.* at 240. And "[j]ustice require[d] that the American community repair the damage that decades of racial segregation [has] done to its black members." *Id.* Judge Motley believed that *Brown* provided both a legal and moral foundation for affirmative action programs, which she regarded as "the twentieth century's most effective engine of change . . . ." *Id.* at 230.

Judge Carter also concluded that affirmative action programs enacted after *Brown* contributed to

the emergence of a strong African-American middle class by removing barriers to social advancement. *See* Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 ST. LOUIS U. L.J. 885, 886 (1993) ("[I]n the 1960s and 1970s a viable African-American middle class emerged for the first time as a reality in this country, benefitting from school desegregation, affirmative action policies[,] and local and federal laws barring discrimination in employment.").

In short, the *Brown* lawyers were strong proponents of affirmative action, and believed that such programs "must continue" to combat the residual effects of slavery and a century of legalized segregation. Motley, *supra*, at 6. They made a clear distinction between the invidious use of racial classifications used to segregate and demean that were at issue in *Brown* and the use of race in affirmative action programs to expand educational and economic opportunities for African-Americans and other minorities. The *Brown* lawyers viewed affirmative action as essential to *Brown*, and its promise to dismantle longstanding barriers created by government-sponsored segregation to the advancement of racial minorities. And to them, this Court's recent efforts to curtail affirmative action programs represented a step backward toward the majority in *Plessy*, not *Brown* or Justice Harlan. *See id.* at 230 ("The derailment [of voluntary affirmative action plans] is, in my view, the exact parallel of the nineteenth-century derailment caused by the Supreme Court's 1896 decision in *Plessy v. Ferguson* sanctioning 'separate but equal.'");

see also Hon. Constance Baker Motley, *Remarks at the Thurgood Marshall Commemorative Luncheon*, 62 BROOK. L. REV. 531, 532 (1996) ("[T]he end of affirmative action in government programs will undoubtedly signal to many in the private sector an end to all affirmative action, leaving black Americans without effective legal redress for continuing racial discrimination in education, employment and housing.").

CONCLUSION

"This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children." *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring). The country and this Court failed that obligation after the Civil War by labeling African-Americans as inferior and imposing a system of state-enforced segregation in *Plessy*. Justice Harlan acknowledged this failure and proved prophetic about the treatment of African-Americans over the next half-century. *Brown* was this country's first step in making true on its promise, and was the product of lawyers who believed that greater integration and diversity were the only way to ensure equal educational opportunity for children of all backgrounds.

A ruling against the University of Texas that incorporates colorblindness is inconsistent with the history of the Fourteenth Amendment, Justice Harlan's dissent, and the views of the *Brown* lawyers. A

colorblind reading of the Equal Protection Clause in the context of university and college admissions will tremendously impact the educational opportunities available to millions of students across the nation that will be the next generation of leaders, and threatens to scuttle the progress this country has made in race relations in the 61 years since *Brown*. In sum, a colorblind interpretation of the Equal Protection Clause in this case cannot be based upon any reading of Justice Harlan's dissent, the *Brown* opinion itself, or the views of the *Brown* lawyers.

Respectfully submitted,

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